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The Honorable Michael K. Powell
Chairman
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: Carriage of the Transmissions of Digital Broadcast Stations, CS Docket No. 98-120.

Dear Chairman Powell:

I am writing to you to address issues of grave importance to the Courtroom Television Network ("Court TV") as the Commission considers ways to expedite the transition to digital television. The question of mandatory carriage of broadcast signals, a policy adopted by Congress in 1992 to serve an entirely different purpose, has become enmeshed in the debates about how to facilitate the digital transition. However, as explained below, must carry is not the key to the transition, and any attempt to have it serve that purpose raises significant legal problems.

The disconnect between must carry and the digital transition was underscored by a recent General Accounting Office ("GAO") report, entitled *Additional Federal Efforts Could Help Advance Digital Television Transition* (November 2002) ("GAO Report"). Notably, the GAO observed that mandatory carriage requirements were unlikely to have a significant impact on the move to digital TV. GAO Report at 25. Among other things, it found that "[m]ost stations, including the great majority of those affiliated with a major broadcasting network, do not need to invoke 'must carry' because cable systems desire to carry them" and they secure carriage under retransmission consent agreements. *Id.* at 23-24. Accordingly, the GAO recommended that the FCC should: (1) increase public awareness about the transition and its implications, (2) consider bolstering the recently adopted digital-tuner mandates, and (3) consider setting a date-certain for cable carriage switch from analog to digital carriage. *Id.* at 39-40. The GAO Report accepted the Commission's earlier decision that a dual carriage requirement would violate the First Amendment. *Id.* at 25.

While the debate has moved away from the question of "dual carriage" and has focused more on proposals for "multicast carriage," it would be a mistake for the

Commission to assume that the constitutional problems of must carry have been resolved. The Commission has recognized in this proceeding that any change in the must carry rules must satisfy the First Amendment standard articulated by the Supreme Court in the *Turner* cases. This conclusion is equally valid for any analysis of the current "multicast carriage" proposals as it was for the "dual carriage" plan already rejected by the Commission.

The constitutional problems of multicast carriage are highlighted by a letter sent to you on behalf of must carry proponents by Senators Trent Lott and Larry Craig on October 11, 2002. Far from making the case for "multicast" carriage of digital broadcast signals, the letter underscores the First Amendment and policy infirmities of the broadcasters' position. Court TV believes that this letter inadvertently reveals the true nature of the demand for multicast carriage: It is a plea for the FCC to adopt a content-based preference for certain programmers at the expense of others in the service of newly-discovered goals that are far removed from the analog must carry requirements set forth in the 1992 Cable Act. As such, the demands for multicast carriage fail each of the constitutional inquiries set forth in *Turner Broadcasting System v. FCC*, 520 U.S. 180 (1997) ("*Turner II*") and *Turner Broadcasting System v. FCC*, 512 U.S. 622 (1994) ("*Turner I*").

In essence, the October 11 letter suggests that multicast carriage is needed in order to promote various types of broadcast content. Senators Lott and Craig express their "concern" that a lack of mandatory carriage for broadcasters' multiple digital signals "will have a disproportionate effect" on "religious and multilingual broadcasters." Without an FCC rule requiring multicast carriage, the letter continues, "the constructive and positive programming which [the broadcasters] offer will be highly diluted as a percentage of the total channels available on digital cable systems." The letter credits must carry requirements with "fostering the availability of local, family friendly, and spiritual programming to cable television viewers," and with ensuring that "news, sports, and wholesome programming of local and regional interest is available on cable systems." It asks the Commission to help "ensure that such important programming will flourish and grow" during the digital transition.

First Amendment Considerations

The Commission already has determined that, on the existing record, requiring cable operators to carry both a broadcaster's analog signal and its digital signal would burden cable operators' First Amendment interests more than necessary to further the government's interest. However, reorienting the inquiry to "multicast" carriage rather than dual carriage does not dispose of the fundamental constitutional concerns in this proceeding. This is because the First Amendment problems associated with digital must carry are not based solely on a channel "capacity crunch," but flow from the basic justifications for the policy and the preferential treatment that would be accorded to broadcasters over cable programmers. 1/ Moreover, Senator Lott's suggestion that multicast carriage should be

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1/ Of course, capacity problems *do* raise constitutional issues as well. They are just not the only problems. The GAO found, for example, that "[m]any smaller cable systems have not installed fiber optic cable lines or made other upgrades to their cable network that allow for the carriage of digital signals. As a result, these

required in order to promote "local, family friendly, and spiritual programming" only exacerbates the constitutional problems the Commission must resolve.

No Substantial Interest. As a threshold matter, the argument that the FCC must adopt multicast carriage in order to promote the transition to digital television has nothing to do with the reasons Congress adopted analog must carry in the 1992 Cable Act. This is not to suggest that the FCC lacks a substantial interest in the transition to digital television. But it simply is not an interest that Congress sought to promote through the adoption of a must carry mandate in 1992. Indeed, Congress did not mention the digital transition in the legislative history of the Cable Act, and certainly did not discuss the benefits of "multicasting," since the policy debate within the Commission at that time centered on high definition television. To the extent Congress has spoken at all on the issue, it has been to *extend* the transition by making its termination contingent upon public acceptance of digital broadcast technology. Pursuant to the Balanced Budget Act of 1997, the date for returning analog broadcast frequencies was put off indefinitely in any market in which less than 85 percent of television households are able to receive DTV signals. *See* Pub. L. 105-33 (Aug. 5, 1997) (codified at 47 U.S.C. § 309(j)(14)(B)). In short, a public interest mandate to expedite the transition cannot be gleaned from any congressional enactment.

This is not just a policy question – *i.e.*, whether a public interest argument can be concocted to support a multicast carriage rule – it is a matter of constitutional dimension. The Commission may impose carriage requirements *only* if it can demonstrate that multicasting is necessary to serve a substantial governmental interest. It cannot be just any interest, but must be in support of the original purpose of the enactment. *See e.g.*, *Edenfield v. Fane*, 507 U.S. 761, 768 (1993) (it is impermissible to "supplant the precise interests put forward by the State with other suppositions"). Here, analog must carry was upheld in the *Turner* cases by the narrowest of margins in a decision heavily dependent on specific enunciated interests supported by congressional findings. *See Turner II*, 520 U.S. at 190-191 (refusing to include in its constitutional review any rationale "inconsistent with Congress' stated interests in enacting must carry"); *cf.*, *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985); *Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987) (refusing to sanction must carry rules in the absence of congressional findings).

Guaranteeing broadcasters a platform from which to launch new multicast services simply is not what Congress contemplated in the Cable Act. In this regard, a multicast carriage mandate would not promote a "multiplicity of *sources* of video programming," but would – at most – give current broadcasters a multiplicity of channels. Nor would a multicast requirement "promote fair competition among providers of video programming." Quite to the contrary, multicast carriage would subvert the Cable Act's goal by giving broadcasters an undeserved preference over cable programmers, who have no such guarantee of carriage. It is not enough for broadcasters to assert that multicast carriage would be good for their business – they must demonstrate that such carriage would serve the public interest as specifically contemplated by Congress. *Cf. FCC v. Sanders Bros. Radio*

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systems are highly limited in their channel capacity and are unable to carry local digital broadcast channels in a digital format." GAO Report at 21-22.

Station, 309 U.S. 470, 476 (1940) ("economic injury to an existing station is not a separate and independent element to be taken into consideration by the Commission" in determining the public interest).

Unconstitutional Favoritism. A multicast carriage requirement would establish an unconstitutional preference for broadcast programming by magnifying the regulatory advantages that broadcasters already receive. For example, broadcasters do not have to pay for carriage, and in fact are statutorily barred from doing so even though were "loaned" spectrum valued at $70 billion (over and above their existing allocations of free spectrum) to establish DTV service. *See* 47 U.S.C. § 614(b)(10).

By sharp contrast, the regulatory and marketplace realities facing cable operators and cable networks are entirely different from those facing broadcasters. For one thing, the cable industry has invested heavily in developing digital transmission capability and did not have the benefit of a gift of free spectrum. *See* Comments of the National Cable & Telecommunications Association on the *Further Notice*, filed June 11, 2001, at 18-19 ("[c]able operators have spent billions of dollars to increase capacity," including "200 MHz in added capacity [for] new video and non-video digital services," such as digital video, high definition programming, Internet services, pay-per-view, video-on-demand, telephony, digital audio, and interactive television). In addition, cable operators must pay local franchising authorities for the use of public rights-of-way, and cable networks, in turn, often must pay to secure a place on programming tiers. As Court TV informed the Commission in its comments in this proceeding, some of the larger MSOs require payment of upwards of several dollars per subscriber for carriage, plus marketing support designed to maintain network viability in an increasingly competitive cable program market. Indeed, over last several years, Court TV agreed to a variety of financial inducements in affiliation agreements valued over the terms of such agreements at $750 million (including launch/marketing support and varying free carriage terms) in order to reach an additional 30 million subscribers.

In short, not only must cable programmers like Court TV compete for carriage in an open market, they must do so against others who already receive considerable regulatory leverage because of their broadcast affiliations. Even programmers who do not assert their must carry rights can use retransmission consent to secure carriage for their broadcast channels along with their other channels, as well as placement on preferred tiers. While the most notable example of such arrangements is the ABC-Disney-ESPN affiliation, it is by no means a unique phenomenon. *See generally American Cable Association Petition for Inquiry Into Retransmission Consent Practices* (filed October 1, 2002). In such an environment, any added mandates that create preferences for favored programmers weigh heavily against networks lack such regulatory largess. In view of the disadvantages suffered by cable programmers vis-à-vis broadcasters already due to must carry, any additional regulatory favoritism would make the marketplace all the more non-competitive.

The Supreme Court recognized the significant burdens imposed on cable programmers when it narrowly upheld analog must carry rules. *Turner I*, 512 U.S. at 645 ("Broadcasters, which transmit over the airwaves, are favored [in a must carry scheme], while cable programmers, which do not, are disfavored."). It is highly unlikely the Court would approve a multicast carriage regime that increases this disparate treatment without

serving any recognized statutory goals. Accordingly, the Commission should reject broadcasters' proposals for multicasting mandates.

Content-Based Regulation. The letter from Senator Lott emphasizes a particular problem from a constitutional standpoint – an inherent preference in any multicast scheme for broadcast content. This preference runs headlong into the findings of the *Turner* cases, that must-carry can only be upheld (if at all) if it is strictly content-neutral. The one point on which a majority of the Court agreed was that any must carry regime justified by the value of the programming itself would be presumptively invalid. *Turner I*, 512 U.S. at 644-646; *see also id.* at 678-681 (O'Connor, J., concurring in part and dissenting in part).

Not only is any such content-based preference constitutionally infirm, the assumptions on which it is based are plainly wrong. There is no basis for the assertion that broadcasters provide programming that is more "public interest" oriented than cable networks. Court TV, for example, is the only television network devoted to in-depth coverage of legal issues. We are the first and only cable network dedicated to the full panoply of the criminal justice system, the investigative process and justice, featuring a daytime schedule rich with live trials, legal commentary, news on law-related topics, and programming concerning crime and its impact on society. Court TV is by no means alone among cable networks in our commitment to public interest programming. Indeed, objective studies of the television landscape have shown that there is more "public interest" programming on cable networks than is typically available on broadcast TV. *See, e.g.*, Eli M. Noam, *Public Interest Programming By American Commercial Television*, in PUBLIC TELEVISION IN AMERICA, 145-176, at 160-62 (Eli M. Noam and Jens Waltermann, eds., 1998).

Conclusion

Court TV appreciates the difficult task the Commission and industry face in managing the move from analog to digital television. The difficult policy issues require the resolution of many elements, ranging from technical issues to the management of digital rights. But as the GAO most recently found, must carry is not a significant factor in this complex puzzle. For that reason, as well as the legal problems discussed in this letter, the Commission should eliminate the distraction caused by the debate over multicast carriage, and focus instead on issues that will actually promote the transition.

Sincerely,

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